



Signed: June 08, 2011

EDWARD D. JELLEN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re Case No. 11-40564 EDJ
Chapter 7
HENRY CHEN aka Chien Jung Chen,
and NAILING HUNG CHEN,
Debtors./

MEMORANDUM

John T. Kendall, trustee in bankruptcy ("Kendall"), has objected to certain claims of exemption by Henry Chen and NailLing Chen, the above debtors (the "Chens"), as to several annuities and life insurance policies. The court will sustain the objections.

A. The Annuities

The three annuities at issue (hereinafter, collectively, the "Annuities") are: (1) a Jackson National Life Perspective II Annuity in the name of Chien-Jung (Henry) Chen, for which the Chens claim an exemption in the sum of \$75,493.68, (2) a Jackson National Life Perspective II Annuity in the name of NailLing Hung Chen, for which the Chens claim an exemption in the sum of \$20,098.29, and (3) an

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1 ING GoldenSelect Premium Plus Annuity in the name of Henry Chen, for
2 which the Chens claim an exemption in the sum of \$24,445.68.¹

3 The Chens claim the annuities as exempt pursuant to the private
4 retirement plan exemption provided by Cal. Civ. Proc. Code
5 § 704.115(a)(1) & (2), and (b).

6 Cal. Civ. Proc. Code § 704.115(b) provides "All amounts held,
7 controlled, or in the process of distribution by a private
8 retirement plan, for the payment of benefits as an annuity, pension,
9 retirement allowance, disability payment, or death benefit from a
10 private retirement plan are exempt." "Private retirement plan" is
11 defined in Cal. Civ. Proc. Code § 704.115(a) as follows:

12 (a) As used in this section, "private retirement plan"
13 means:

14 (1) Private retirement plans, including but not limited
15 to, union retirement plans.

16 (2) Profit-sharing plans designed and used for retirement
17 purposes.

18 (3) Self-employed retirement plans and individual
19 retirement annuities or accounts provided for in the
20 Internal Revenue Code of 1986, as amended, including
21 individual retirement accounts qualified under Section 408
22 or 408A of that code, to the extent the amounts held in
23 the plans, annuities, or accounts do not exceed the

21 ¹The Chens' Schedule C (Property Claimed as Exempt)
22 describes the Annuities as, respectively, a "Jackson National
23 variable annuities 401(k)", a "Jackson National Life Insurance
24 variable annuity", and an "Annuity IRA." It is clear, however,
25 from the Declaration of Johnson C.W. Lee filed in support of
26 Kendall's objection, which includes copies of the Annuities at
issue, that the Annuities at issue are those as described herein
notwithstanding the fact that the descriptions in Schedule C
differ.

1 maximum amounts exempt from federal income taxes under
2 that code.

3 The Chens argue, based on certain promotional materials they
4 received in connection with the Annuities that extol the retirement
5 benefits of the Annuities, and their "subjective intent" to use the
6 Annuities for retirement purposes, that the Annuities qualify as
7 "private retirement plans" within the meaning of Cal. Civ. P. Code
8 § 704.115(a).

9 This argument fails. In In re Lieberman, 245 F.3d 1090, 1091
10 (9th Cir. 2001), the Ninth Circuit concluded that the "California
11 legislature intended the exemption provided by Cal. Civ. Proc. Code
12 § 704.115(a)(1) to apply to a retirement plan created by a private
13 employer or employee organization, as opposed to an arrangement by
14 an individual to use specified assets for retirement purposes."
15 Similarly, in In re Simpson, 557 F.3d 1010, 1018 (9th Cir. 2008),
16 the Ninth Circuit noted with reference to Cal. Civ. Proc. Code
17 § 704.115(a)(1) that "A survey of recent California Court of Appeal
18 cases construing the statute does not reveal a single instance in
19 which that court has interpreted section 704.115(a)(1) to include
20 independent retirement investments [citations omitted]."

21 Under these holdings, then, the Chens' subjective intent to use
22 the Annuities for retirement purposes is irrelevant.

23 Because the Annuities were not created by a private employer of
24 the Chens, or by an employee organization, they cannot be exempt
25 under Cal. Civ. Proc. Code § 704.115(a)(1). And because they are
26 not a profit sharing plan, they cannot be exempt under Cal. Civ.

1 Proc. Code § 704.115(a)(2).

2 The Chens did not claim the Annuities as exempt pursuant to
3 Cal. Civ. Proc. Code § 704.115(a)(3), nor did they brief the issue
4 of the applicability of that provision to the Annuities. Suffice it
5 to say for present purposes, however, that based on the facts and
6 analysis set forth in the Declaration of Jay D. Crom filed in
7 support of Kendall's objection, the objection will also be sustained
8 with respect to Cal. Civ. Proc. Code § 704.115(a)(3).

9 B. The Life Insurance Policies

10 The four life insurance policies at issue (hereinafter,
11 collectively, the "Life Insurance Policies") are unmatured. Kendall
12 believes that the Chens are entitled to borrow against them, subject
13 to certain loan value limitations in the policies. The Life
14 Insurance Policies were issued by New York Life, Transamerica, and
15 Western Reserve Life, which issued two policies for the benefit of,
16 respectively, Andrew Chen and Jennifer Chen.

17 The Chens claim that the Life Insurance Policies are exempt
18 pursuant to Cal Civ. Proc. Code § 704.100(a), which provides:
19 "Unmatured life insurance policies (including endowment and annuity
20 policies), but not the loan value of such policies, are exempt
21 without making a claim." The parties agree that the maximum
22 aggregate loan value that the Chens may exempt is \$22,950.

23 The Chens state in their reply brief that two of the policies
24 are "essentially" held by them "in trust" for their children. They
25 provide no authority or documentation in support of this contention,
26 and have not disputed that they enjoy, for their own benefit, the

1 loan values of the Life Insurance Policies. Therefore, the court
2 does not consider such statement to be a valid argument against
3 Kendall's objection to the Chens' claim of exemption as to the Life
4 Insurance Policies, or right to include such policies as part of the
5 bankruptcy estate pursuant to Bankruptcy Code § 541(a)(1). See In
6 re Woodson, 839 F.2d 610, 617-18 (9th Cir. 1988) (discussing the
7 difference between the rights of an owner of a life insurance
8 policy, which may be included in the owner's bankruptcy estate under
9 Bankruptcy Code § 541(a)(1), and the rights of a beneficiary of a
10 life insurance policy).

11 The parties are not in full agreement as to the specific loan
12 values of the Life Insurance Policies. Consequently, the court will
13 issue its order sustaining Kendall's objection to the extent that
14 the loan values of the Life Insurance Policies exceed \$22,950,
15 reserving jurisdiction to resolve any disputes in connection
16 therewith.

17 C. Conclusion

18 The court will sustain Kendall's objections to the Chens'
19 claims of exemption for the Annuities, and claims of exemptions for
20 the Life Insurance Policies to the extent that the loan values
21 thereof exceed \$22,950, reserving jurisdiction to resolve any
22 disputes in connection with the loan value issue.

23 The court requests counsel for Kendall to submit a proposed
24 order within 10 days.

25 ** END OF MEMORANDUM **
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